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August 17, 1998

THOMAS J. HUTTON
202-828-1892

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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AUG 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In the Matter of
Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast Stations.
(Shoshoni, Wyoming)
MM Docket No. 98-99; RM-9283

Dear Ms. Salas:

Transmitted herewith, on behalf of Mount Rushmore Broadcasting, Inc., is an original and four copies of its Comments and Counterproposal in the above-captioned rule making proceeding.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If you have any questions, please contact the undersigned.

Very truly yours,

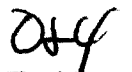
HOLLAND & KNIGHT LLP



Thomas J. Hutton
Counsel for
Mount Rushmore Broadcasting, Inc.

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Enclosure

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Shoshoni, Wyoming))

MM Docket No. 98-99
RM-9283

To: Chief, Allocations Branch

COMMENTS AND COUNTERPROPOSAL

I. INTRODUCTION.

1. Mount Rushmore Broadcasting, Inc. ("Mount Rushmore"), by its attorneys, files its Comments and Counterproposal with respect to the Notice of Proposed Rule Making ("NPRM") released by the Allocations Branch on June 26, 1998 (DA 98-1216). The NPRM, issued at the request of Windy Valley Broadcasting ("Windy Valley"), proposes to allot Channel 290C to Shoshoni, Wyoming.

2. Mount Rushmore respectfully urges the Commission to reexamine its FM allocation policy, so as to better serve the public interest. In conjunction with the Commission's pending rule making on auction procedures for mutually exclusive commercial broadcast license applications (*Notice of Proposed Rule Making*, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (rel. Nov. 26, 1997)) and with its notice of inquiry on the broadcast ownership rules (*Notice of Inquiry*, MM Docket No. 98-35 (rel. Mar. 13, 1998)), the Commission should institute a notice of inquiry to determine (1) whether the current FM allocation policy continues to meet the Commission's obligation under Section 307(b) of the Communications Act of 1934 (the "Act"), as amended, and (2) whether the policy has been detrimental to the

enhancement of minority ownership of FM broadcast stations. In the meantime, the Commission should cease application of its FM allocation policy.

3. Alternatively, if the Commission nonetheless decides to apply its current FM allocation policy here, then Mount Rushmore proposes to allot Channel 290A to Shoshoni, Wyoming and to Dubois, Wyoming, which will provide a first local service to each community.

II. THE COMMISSION SHOULD INSTITUTE A NOTICE OF INQUIRY TO EVALUATE WHETHER THE CURRENT FM ALLOCATION POLICY CONTINUES TO MEET THE COMMISSION'S OBLIGATION UNDER SECTION 307(b) OF THE ACT AND WHETHER THE POLICY HAS BEEN DETRIMENTAL TO THE ENHANCEMENT OF MINORITY OWNERSHIP OF FM BROADCAST STATIONS.

4. The FM Table of Assignments ("FM Table") is intended to allow the Commission to meet its obligation under Section 307(b) of the Act to provide a "fair, efficient and equitable distribution of radio service" to the various states and the communities within them. The Commission has stated that the objectives to be served by the FM Table are:

- * Provision of some service of satisfactory signal strength to all of the country;
- * Provision of as many program choices to as many listeners as possible; and
- * Service of local origin to as many communities as possible.

Second Report and Order, 90 F.C.C. 2d 88, 89 (1982).

5. In its *Second Report and Order*, in response to the growing demand for FM channels, the Commission reevaluated its original FM priorities (adopted in 1961) and adopted new, updated FM priorities to evaluate conflicting allocation proposals. The priorities are:

- "(1) First full-time aural service.
- (2) Second full-time aural service.

(3) First local service.

(4) Other public interest matters.

[Co-equal weight would be given to priorities (2) and (3)]."

Second Report and Order, 90 F.C.C. 2d at 91.

6. Mount Rushmore urges the Commission to again reevaluate and update its FM priorities. In the current environment of high demand for and low supply of FM channels everywhere, the existing FM allocation policy no longer meets the Commission's obligation under Section 307(b), nor serves the objectives of the FM Table. In particular, the Commission's application of the current FM priorities to conflicting allocation proposals have resulted in inadequate attention to local service and the needs of smaller, rural communities.

7. Indeed, in cases involving conflicting proposals, the existing FM priorities favor large, urban areas over smaller, rural communities. For example, under the Commission's current FM allocation policy, in cases involving a choice between second aural and first local services or between two first local services, preference would be given to the larger, more populous community, leaving the smaller communities underserved. *See Second Report and Order*, 90 F.C.C. 2d at ¶ 11; *St. Marks and Woodville, Florida*, 12 FCC Rcd 11,957 (Alloc. Branch 1997).

8. The institution of auctions for contested FM cases is another recent development that makes it appropriate to reexamine the Commission's FM allocation policy. Now that the auction process will be used to select the party that will use a particular channel, it is more important than ever to make sure that channels are allocated to the appropriate communities. The Commission's system of adding channels through petitions by parties such as Windy Valley should be suspended and reexamined in light of current conditions, including the new auction

procedure. Accordingly, the Commission should institute a notice of inquiry to determine whether its current FM allocation policy meets the Commission's obligation under Section 307(b) of the Act.

9. In addition, the Commission's existing FM allocation policy may be detrimental to the enhancement of minority ownership of FM broadcast stations because the current policy favors incumbent station owners that have the knowledge, resources and financial means to institute a petition for rule making to amend the FM Table, to apply for a construction permit, and then to participate in an auction for the new FM station.

10. In his speech to the NAB Convention in April 1998, Chairman Kennard reported that he was "dismayed to see that minority broadcast ownership was a mere 3.1% in 1996. This year that's dropped to 2.8%." With respect to radio stations, in particular, the number of minority-owned commercial radio stations declined from 312 in 1995 to 284 in 1996/97. *See* Minority Commercial Broadcast Ownership in the U.S., a report of the Minority Telecommunications Development Program, National Telecommunications and Information Administration (Aug. 1997).

11. The Commission has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encourage minority participation in the telecommunications industry. Indeed, in his recent speech at the NAB Convention, Chairman Kennard issued a challenge to the broadcast industry to "develop ideas to promote opportunity for ownership by minorities and women within the broadcast industry."

12. Accordingly, Mount Rushmore proposes that the Commission institute a notice of inquiry to determine whether its current FM allocation policy has been detrimental to the

enhancement of minority ownership of FM stations and to explore ways to foster opportunities in broadcast ownership for minorities and women. The Commission has an obligation to act now and, in the interim, to cease application of its current FM allocation policy.

III. CHANNEL 290A, SHOSHONI, WYOMING AND CHANNEL 290A, DUBOIS, WYOMING IS THE PREFERRED ALLOCATION.

13. In the event the Commission decides to proceed with this particular rule making, Mount Rushmore proposes the allotment of Channel 290A to Shoshoni, Wyoming and to Dubois, Wyoming, which will provide a first local service for each community. Mount Rushmore's proposal is the preferred allocation because it would provide a first local service to two communities, whereas Windy Valley's proposed allotment of Channel 290C to Shoshoni, Wyoming would provide a first local service to only one community. As demonstrated in the Engineering Statement attached hereto as Exhibit E, Channel 290A may be assigned to Shoshoni and to Dubois, Wyoming in full compliance with Section 73.202(b) of the Commission's Rules. If Mount Rushmore's proposal is adopted, Mount Rushmore will apply for construction permits for Channel 290A in both communities.

14. Shoshoni is an incorporated community with a population of 497, as designated by the U.S. Census.¹ The community of Shoshoni has its own post office and zip code, and its own mayor, town council, town hall, chamber of commerce, and volunteer fire department. Shoshoni also has a school, a public library, 2 motels, 3 churches, 2 restaurants, several social and civic organizations, and approximately 6 other businesses. Tourism at nearby national parks increases the population of this community during the months of May-September. Shoshoni is

¹ Hereinafter, all population data are based on the 1990 U.S. Census.

an underserved community and has a need for a daily resource for information on current civic, cultural and school issues and events that could be provided by a local radio station.

15. Dubois is an incorporated community in a rural area. The U.S. Census designates Dubois as a community and credits it with a population of 895 people. Dubois is governed by an elected mayor and a town council, and has its own town hall, post office, zip code, and volunteer fire department. The community also has a chamber of commerce, a library, 2 schools, 6 churches, 10 restaurants, 5 gas stations, 5 motels, 3 clothing stores, and several social and civic organizations. During tourism season (June-September) where vacationers visit nearby national parks, the population of Dubois increases measurably. Channel 290A would provide a first local broadcast facility to this underserved community. The allotment of an FM channel at Dubois would provide not only an outlet for local expression but also would provide the Dubois area with information, such as road closures, during emergency conditions caused by severe weather.

16. Where, as here, the first two FM priorities are not implicated, the Commission must be guided by FM priority 3, first local service. The allotment of Channel 290A to Shoshoni, Wyoming and to Dubois, Wyoming would provide a first local service to each community. Windy Valley's proposal to allot Channel 290C to Shoshoni, Wyoming also would provide a first local service to a community. Thus, both proposals fulfill FM priority 3. However, Mount Rushmore's proposal would provide a first local service to two communities rather than to only one community as proposed by Windy Valley. Mount Rushmore's proposal also would result in more efficient use of the channels by allotting Channel 290A to two communities, Shoshoni and Dubois, Wyoming, rather than only to Shoshoni as proposed by Windy Valley. Further, the combined populations of Shoshoni and Dubois (1392) is greater than

Windy Valley. Further, the combined populations of Shoshoni and Dubois (1392) is greater than the population of Shoshoni alone (497). Accordingly, the public interest favors the grant of Mount Rushmore's proposal which would provide first local service to two communities and also to the most people.

IV. CONCLUSION.

For the reasons stated above, Mount Rushmore respectfully requests that the Commission institute a notice of inquiry to determine (1) whether the current FM allocation policy continues to meet the Commission's obligation under Section 307(b) of the Act, and (2) whether the policy has been detrimental to the enhancement of minority ownership of FM broadcast stations. In the meantime, the Commission should cease application of its FM allocation policy. If, however, the Commission nonetheless decides to apply its current FM allocation policy here, then Mount Rushmore respectfully requests that the Commission adopt its Counterproposal and allot Channel 290A to Shoshoni, Wyoming and to Dubois, Wyoming.

Respectfully submitted,

Mount Rushmore Broadcasting, Inc.


Thomas J. Hutton

Patricia Y. Lee

Its Attorneys

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August 17, 1998

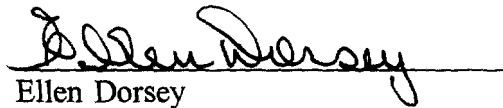
WAS1-373208

CERTIFICATE OF SERVICE

I, Ellen Dorsey, an employee of Holland & Knight LLP, hereby certify that on August 17, 1998, a copy of the foregoing Comments and Counterproposal of Mount Rushmore Broadcasting, Inc. was served by first class U.S. Mail, postage prepaid, to the following:

A. Wray Fitch, III, Esq.
Gammon & Grange, P.C.
8280 Greensboro Drive
McLean, Virginia 22102-3807

Counsel for Windy Valley Broadcasting


Ellen Dorsey

**EXHIBIT E
ENGINEERING STATEMENT
IN SUPPORT OF A COUNTERPROPOSAL
TO THE PROPOSED RULE MAKING
IN MM DOCKET NO. 98-99**

INTRODUCTION

This engineering statement was prepared on behalf of Mount Rushmore Broadcasting, Inc. It supplies technical information in support of a counterproposal to the petition by Windy Valley Broadcasting in MM Docket No. 98-99 for the proposed allotment of Channel 290C at Shoshoni, Wyoming. Mount Rushmore Broadcasting, Inc. proposes that the Commission amend the Table of Allotments in C.F.R. 47 §73.202(b) by allotting Channel 290A to Shoshoni, Wyoming and 290A to Dubois, Wyoming as the first local FM service for each community.

ALLOCATION STUDY

Channel 290A can be allotted to Dubois, Wyoming in concurrence with the allotment of Channel 290A at Shoshoni. Both allotments can be made in full compliance with the minimum distance separation requirements in §73.207 of the FCC Rules.

The geographic coordinates of the proposed reference location for Dubois, Wyoming are North 43° 32' 01" and West 109° 37' 47". The reference location for Shoshoni, Wyoming is identified in MM Docket 98-99 as North 42° 54' 24" and West 108°

35' 00". Channel allocation studies for both Dubois and Shoshoni, Wyoming are attached to this statement as Figures 1 and 2, respectively. In addition, the reference location for each proposal is consistent with the transmitter location requirements set forth in §73.315(a) of the Commission' Rules.

Respectfully submitted,
LOHNES AND CULVER



D. Scott Turpie

August, 1998

FIGURE 1
FM ALLOCATION STUDY
COUNTERPROPOSAL IN MM DOCKET NO. 98-99
CHANNEL 290A AT DUBOIS, WYOMING

<u>CHANNEL</u>	<u>STATION</u>			<u>DISTANCE SEPARATION IN KM</u>	
	<u>CALL</u>	<u>CLASS</u>	<u>CITY, STATE</u>	<u>ACTUAL</u> ⁽¹⁾	<u>REQUIRED</u> ⁽²⁾
236	No station within any applicable minimum distance separation requirement				
237	No station within any applicable minimum distance separation requirement				
287	No station within any applicable minimum distance separation requirement				
288	No station within any applicable minimum distance separation requirement				
289	No station within any applicable minimum distance separation requirement				
290	PADD	A	Shoshoni, WY	127.5	115
291	No station within any applicable minimum distance separation requirement				
292	No station within any applicable minimum distance separation requirement				
293	No station within any applicable minimum distance separation requirement				

Assumed Allotment site coordinates: 43° 32' 01" 109° 37' 47"

- Notes:
- (1) Calculated distance separation between stations in accordance with Section 73.208 of the FCC Rules.
 - (2) Required minimum distance separation between stations per Section 73.207 of the FCC Rules.

Prepared by
Lohnes and Culver Washington, D.C.
August, 1998

FIGURE 2
FM ALLOCATION STUDY
COUNTERPROPOSAL IN MM DOCKET NO. 98-99
CHANNEL 290A AT SHOSHONI, WYOMING

<u>CHANNEL</u>	<u>STATION</u>		<u>CITY, STATE</u>	<u>DISTANCE SEPARATION IN KM</u>	
	<u>CALL</u>	<u>CLASS</u>		<u>ACTUAL</u> ⁽¹⁾	<u>REQUIRED</u> ⁽²⁾
236	No station within any applicable minimum distance separation requirement				
237	No station within any applicable minimum distance separation requirement				
287	No station within any applicable minimum distance separation requirement				
288	No station within any applicable minimum distance separation requirement				
289	No station within any applicable minimum distance separation requirement				
290	PADD	A	Dubois, WY	127.5	115
291	No station within any applicable minimum distance separation requirement				
292	No station within any applicable minimum distance separation requirement				
293	No station within any applicable minimum distance separation requirement				

Assumed Allotment site coordinates: 43° 14' 06" 108° 06' 36"

- Notes:
- (1) Calculated distance separation between stations in accordance with Section 73.208 of the FCC Rules.
 - (2) Required minimum distance separation between stations per Section 73.207 of the FCC Rules.